

NORTHERN TERRITORY OF AUSTRALIA

RACING APPEALS TRIBUNAL

PAUL GARDNER

AND

THE STEWARDS OF THE

ALICE SPRINGS TURF CLUB

CHAIRMAN: TOM PAULING AO QC

PANEL: TERESA HALL

JAMES DE-BELIN

Mr Gardner represented himself

Mr Hensler appeared on behalf of the stewards

This is an appeal from a decision which stewards made on 15 August 2017 to fine Mr Gardner the sum of \$7,000 for a breach of Australian Rule 178, in that he presented the gelding Engine Fifty Five for racing at the Alice Spring's Turf club at Pioneer Park with the prohibited substance lignocaine being detected in a post-race blood sample.

We regret the time taken to assemble a tribunal to hear this matter. It is a principle that these hearings be dealt with expeditiously and there is some uncertainty about the appropriate tribunal to hear appeals in the future.

So before embarking on the actual hearing, there are some matters we considered should be brought to the attention of the parties and some matters that may affect how future tribunals may approach the matter of penalty.

The first matter concerns the nature of the appeal to this Tribunal. That issue is discussed at great length in one of our earlier decisions in 1992. It is not necessary for the appellant to show error on the part of the stewards. It is a re-hearing on the material before the stewards with a power for the tribunal to receive further or other material in some circumstances fairly liberally applied. For example, before the stewards, a trainer may not have gathered in his or her mind the real financial costs of a disqualification or other consequences in the immediacy of an inquiry. In those circumstances, it may be proper to allow further evidence as to those matters. In this case, Mr Gardner may refer to matters not mentioned before the stewards but only if it is reasonable to allow him to do so.

The next matter concerns the racing environment at the time earlier tribunals in other places were established. The use of performance enhancing and performance enhancing drugs was believed to be widespread. The technologies now so well employed were primitive then. Even in the Territory some trainers use drugs previously unknown, there was a good chance of getting away with it.

In that climate, the tribunal and their interstate fellow tribunals with whom we were in touch, were encouraged to give very stern warning and we did so in 1992. Stewards have never tired of reminding us of the strict terms in which we charted our future, in particular that for drugs in racing, disqualification is the starting point. At the time that was the correct sentiment. More and more detection of banned substances have involved inadequate withholding periods, negligence, with the occasional sensational discovery. Whereas here a substance such as lignocaine was found, does not attract the attention of, for example, cobalt.

I mention these matters before we have the hearing because Mr Hensler and his predecessors have shown scrupulous attention to fairness in the hearings in a way not always found in courts of summary jurisdiction. It is a matter of credit to them that in over 25 years of hearing appeals in this tribunal, I have not once found the hearings before stewards to have been unfair.

It is important, however that on the question of penalty we do not always look back at the strong pronouncements made at a time when detection was much less certain. A judge I very much looked up to was asked once about penalty and whether severe penalties dissuaded people from offending. 'No,' he said, 'it's the increased risk of being caught.'

There is very little chance of enhancing the performance of a horse and getting away with it now. That needs to temper what we said in 1992. In every case, the penalty needs to fit the severity of the offence. In this jurisdiction, we do not need to give a great deal of attention to general deterrence. We need to look at the penalty afresh and arrive at a fair, just, and reasonable penalty in the particular circumstances of this case.

Mr Gardner submitted that the fine was excessive in all the circumstances. Those circumstances included the fact that no explanation was given for the presence of lignocaine in the sample and the treatment book was not located. It was said to have been inadvertently discarded. Mr Gardner has few horses in work and does farrier work for other stables. In his circumstances there is no doubt that the fine is severe. Both Mr Gardner and Mr Hensler referred us to fines both here and in other jurisdictions. In particular Mr Hensler addressed the tribunal in the following terms.

"Just in regards to your statement in regards to penalties from being disqualifications back in 1992 and the landscape changing. We certainly appreciate that position but we think that was an important decision back in 1992 and to this day the stewards panel still apply those principles that there needs to be, in our view, extenuating and exceptional circumstances to depart from that.

So in regards to this penalty with Mr Gardner, stewards held the view that Mr Gardner's long involvement in the racing industry, of over 32 years, coupled with the fact that the substance detected was therapeutic by nature, were deserving factors to be considered as exceptional circumstances. It is solely for this reason the stewards departed from the normal starting point for breaches of AR178, being a disqualification, and we issued a fine on this occasion.

The form and level of penalty is consistent with the most recent positive-swab cases of NT trainer's that being trainer Gary Clarke and Leanne Gillet. Mr Gardner advances that the loss of his trainers percentage is a point in mitigation. The reality is that, as the trainer, he didn't lose his percentage of prize money as Engine Fifty Five did not win the race by reason of the prohibited substance being detected in the post- race blood sample.

As stated in the transcript on page 18, par 1, the \$7,000 fine imposed was within the national range of penalties for cases involving positive swab's for lignocaine. In relation to fines, that range is between \$4,000 and \$15,000. All the mitigating and aggravating factors were particularised by the panel in announcing this penalty and that was on pages 17 and 18 of the transcript.

Veterinary products containing lignocaine are schedule 4 prescription animal remedies and Mr Gardner has neither been able to explain how the substance came to be in the horses system, nor has he provided treatment records as he is required to do so under the rules of racing.

I can draw a comparison between this case and the most recent appeal before the tribunal, being the case of Gary Clarke back earlier this year. On that occasion the penalty of an \$8,000 fine imposed was reduced to \$5,000. The stewards took heed of the tribunal's decision in that circumstances but we believe the mitigating factors outlined in Mr Clarke's case do not exist in comparison to this case."

We adjourned briefly and announced our decision

We have taken time to consider our position in relation to this matter. We are of the view that the stewards took into account all mitigating and aggravating factors that are relevant to this matter. We are of the view that the situation here is quite different to that of Mr Clarke, where recently a financial penalty was reduced. We are of the view that given all the circumstances of this matter the fine imposed by the stewards was within the parameters of recent fines and was appropriate in all circumstances and therefore we dismiss the appeal.